U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GEORGE CHOPE and U.S. POSTAL SERVICE,
YUBA CITY POST OFFICE, Yuba City, CA

Docket No. 01-1154; Submitted on the Record;
Issued January 3, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for review of the merits pursuant to 5 U.S.C. § 8128(a) on the grounds that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

On March 18, 1993 appellant, then a 61-year-old letter carrier, filed a traumatic injury claim alleging that on that date he experienced pain in both thighs to his knee while loading a vehicle.

The Office accepted appellant's claim for low back strain and herniated disc with radiculopathy and authorized a lumbar laminectomy that was performed on September 30, 1993.

By decision dated May 25, 1999, the Office terminated appellant's compensation effective June 19, 1999 on the grounds that he refused an offer of suitable work as a modified city carrier. In a December 20, 2000 letter, appellant, through his representative, requested reconsideration of the Office's decision.

In a February 16, 2001 decision, the Office denied appellant's request for a merit review of his claim on the grounds that his request for reconsideration was untimely filed and it did not establish clear evidence of error.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for review of the merits pursuant to 5 U.S.C. § 8128(a) on the grounds that his request for reconsideration was untimely filed and failed to present clear evidence of error.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[1] As appellant filed his appeal with the Board on March 26, 2001, the only decision properly before the Board is the Office's February 16, 2001 decision.

Section 8128(a) of the Federal Employees' Compensation Act[2] does not entitle a claimant to a review of an Office decision as a matter of right.[3] The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.[4] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[5]

In this case, the Office properly determined that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.[6]

The last merit decision in this case was issued by the Office on May 25, 1999, wherein the Office terminated appellant's compensation on the grounds that he refused an offer of suitable work. Since appellant's December 20, 2000 request for reconsideration was made outside the one-year time limitation, the Board finds that it was untimely filed.

In those cases where a request for reconsideration is not timely filed, the Board has held, however, that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.[7] Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[8]

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[1] 20 C.F.R. §§ 501.2(c), 501.3(d)(2); *Oel Noel Lovell*, 42 ECAB 537 (1991).

[2] 5 U.S.C. § 8128(a).

[3] *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[4] 20 C.F.R. § 10.607(a).

[5] *See* cases cited *supra* note 3.

[6] *Larry L. Lilton*, 44 ECAB 243 (1992).

[7] *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(d) (May 1996); *see also*, 20 C.F.R. § 10.607(b).

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.[9] The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.[10] Evidence, which does not raise a substantial question concerning the correctness of the Office's decision, is insufficient to establish clear evidence of error.[11] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[12] This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.[13] To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.[14] The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[15]

The issue for purposes of establishing clear evidence of error in this case is whether appellant has submitted evidence establishing that there was an error in the Office's decision to terminate his compensation benefits on the grounds that he refused an offer of suitable work as a modified city carrier.

In support of his request for reconsideration, appellant submitted the September 2 and 30, 1997 reports of Dr. Gary J. Rowe, a Board-certified neurologist, and an impartial medical examiner. These reports were previously of record and considered by the Office. Evidence that repeats or duplicates evidence already in the case record has no new evidentiary value and does not constitute a basis for reopening a case.[16] Therefore, Dr. Rowe's reports are insufficient to establish clear evidence of error.

Appellant also submitted the June 15, 1999 report of Dr. Rita B. Bermudez, a Board-certified physiatrist and his treating physician, finding that he had discogenic low back pain and that he could not perform the duties of the offered position due to his medical restrictions. Dr. Bermudez opined that this job would aggravate appellant's back symptoms, which would lead to more pain. She concluded by noting appellant's physical restrictions and medical

[9] *Dean D. Beets*, 43 ECAB 1153 (1992).

[10] *Leona N. Travis*, 43 ECAB 227 (1991).

[11] *Jesus D. Sanchez, supra* note 3.

[12] *Leona N. Travis, supra* note 10.

[13] *See Nelson T. Thompson*, 43 ECAB 919 (1992).

[14] *Leon D. Faidley, Jr., supra* note 3.

[15] *Gregory Griffin, supra* note 7.

[16] *Mary G. Allen*, 40 ECAB 190 (1988); *Eugene F. Butler*, 36 ECAB 393 (1984).

treatment. Dr. Bermudez's report does not provide new, relevant, pertinent evidence on the central issue in this case, but merely reiterates her previous assertion that appellant cannot perform the duties of the offered position. Thus, her report is insufficient to establish clear evidence of error.[17]

Similarly, Dr. Bermudez's July 12, 2000 report noting that appellant's symptoms and a diagnosis of spinal stenosis, which caused bilateral symptoms in appellant's legs, does not provide new, relevant, pertinent evidence on the central issue in this case. Dr. Bermudez did not address whether appellant was disabled from performing the duties of the offered position of modified city carrier.

In response to appellant's request that she write another letter showing the Office why he could not work, Dr. Bermudez stated in a July 12, 2000 letter that appellant could not return to his prior job. She contended that there was clear evidence of error in the Office's May 25, 1999 decision because it was based on a medical report from Dr. Alan Brown, a Board-certified orthopedic surgeon and impartial medical examiner, who had not seen appellant in over a year. Dr. Bermudez stated that appellant's condition had changed substantially since Dr. Brown evaluated him. She noted that appellant's electromyogram study in 1999 revealed neuropathic changes in the nerves consistent with spinal stenosis, which caused the symptoms in his legs and explained why appellant could not engage in prolonged standing, sitting or walking. Again, Dr. Bermudez merely reiterated her opinion that appellant cannot perform the duties of a letter carrier, thus, her letter is insufficient to establish clear evidence of error.[18] Further, Dr. Bermudez's letter can only be interpreted as demonstrating that the evidence could be weighed differently. However, such a finding would not be sufficient to establish clear evidence of error as the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or to establish a procedural error, but it must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's May 25, 1999 decision.[19]

As no substantial question has been raised as to whether the Office met its burden of proof in terminating appellant's compensation benefits on the grounds that appellant refused an offer of suitable work, the Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for merit review under section 8128(a) on the grounds that his application for review failed to present clear evidence of error.

[17] *Id.*

[18] *Id.*

[19] *Howard A. Williams,* 45 ECAB 853 (1994); *see also Thankamma Mathews,* 44 ECAB 765 (1993); *Leona N. Travis, supra* note 10.

The February 16, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
January 3, 2003

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member